IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF: KENNETH ARCHIE PEEBLES, JR., Petitioner.	NO. 50172-4 STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should the petition be dismissed where the issue presented is the same issue decided on the merits in the defendant's direct appeal and where the defendant has not sustained the heightened showing required before collateral relief can be granted as to the same issue raised in a direct appeal?

2. Should the petition be dismissed on the merits where the defendant has not shown that a lesser included offense instruction was available, and where no evidence has been submitted showing that expert testimony would have been admissible?

B. STATUS OF PETITIONER:

Petitioner Kenneth Archie Peebles, Jr. (the "defendant") is being restrained by a judgment entered in Pierce County pursuant to his conviction of one count of first degree child molestation. Appendix A. The incident that led to the conviction took place during a

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sleep over at the defendant's one-time best friend's home in University Place. Appendix B (slip opinion, p. 2). After having consumed homemade beer, the defendant stayed the night. *Id.* During the night he went to the bedroom where his best friend's eight year old daughter was sleeping. *Id.* He climbed into bed with her, woke her up twice and put his hand under her bed cloths where he touched her buttocks, the area below her hip and her vaginal area. *Id.* The defendant was neither related to nor a caretaker of the eight year old victim. *Id.*

The defendant appealed his conviction. His assignments of error included ineffective assistance of his trial counsel. He assigned error to two aspects of his trial counsel's representation, namely failure to object to certain DNA testimony and failure to object to certain prosecution arguments. Appendix B (slip opinion, § III). This Court resolved the ineffective assistance issue on the merits against the defendant, saying "We reject Peeble's claim of ineffective assistance of counsel." *Id.* at p. 12.

This Court's decision in the defendant's direct appeal was reviewed by a five justice panel of the Supreme Court. Appendix C. The defendant's petition for review was denied on August 3, 2016. *Id.* Thereafter a mandate was issued on September 27, 2016. Appendix D. This petition was timely filed on April 6, 2017, by the same appellate counsel who represented the defendant in his direct appeal.

C. ARGUMENT:

1. THE PETITION SHOULD BE DISMISSED WHERE THE ISSUE PRESENTED IS THE SAME ISSUE DECIDED ON THE MERITS IN THE DEFENDANT'S DIRECT APPEAL AND WHERE THERE HAS BEEN NO SHOWING THAT THE INTERESTS OF JUSTICE WARRANT RECONSIDERATION.

The issue raised in this petition has been previously decided. ***State v. Peebles***, 192 Wn. App. 1058, 2016 WL 901091(2016)(slip opinion, § III). This Court reviewed ineffective assistance in the defendant's direct appeal and held that ineffective assistance

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had not been shown. That decision was the subject of a petition for review which was denied by a five judge panel of the Supreme Court. Appendix C. Where in this petition the defendant has re-worked and re-submitted the same issue (via the same appellate counsel) the issue should be considered previously decided. ***In re Personal Restraint of Jeffries***, 114 Wn.2d 485, 488, 789 P.2d 731 (1990) (The personal restraint petition process is not a substitute for appeal; the defendant cannot raise a valid issue on collateral attack by asserting the same grounds as had been asserted on direct appeal.). Unless the defendant can now show that the interests of justice require re-examination of the issue, ineffective assistance should not serve as a valid ground for relief.

Since ineffective assistance requires review of the whole of trial counsel's performance, in principle this Court has already decided that the grounds now submitted do not warrant relief. A trial attorney's counsel can be said to be deficient only when, considering the entirety of the record, the representation fell below an objective standard of reasonableness. ***State v. McFarland***, 127 Wn.2d 322, 335, 880 P.2d 1251 (1995) ("Competency of counsel is determined based upon the entire record below."). "Strickland begins with a strong presumption that counsel's performance was reasonable." ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), quoting ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42, quoting ***State v. Richenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). ***State v. Piche***, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968).

It was evident in the direct appeal that trial counsel did not call an expert witness on alcohol consumption and did not request a lesser included fourth degree assault instruction. Had those issues been thought of as meritorious the Court surely would have

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requested supplemental briefing. Thus it can be said from a certain perspective that the grounds asserted here were decided against the defendant in his direct appeal.

A personal restraint petition is not a substitute for an appeal. *See* ***In re Personal Restraint of Grasso***, 151 Wn.2d 1, 10, 84 P .3d 859 (2004). A defendant may not reassert an issue rejected on the merits on direct appeal absent a showing that the interests of justice require reconsideration. ***In re Personal Restraint of Yates***, 177 Wn.2d 1, 17,296 P.3d 872 (2013). "This court from its early days has been committed to the rule that questions determined on appeal or questions which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case." ***State v. Bailey***, 35 Wn. App. 592, 594, 668 P.2d 1285 (1983), quoting ***Davis v. Davis***, 16 Wn.2d 607, 609, 134 P.2d 467 (1943). Where issues were not raised on direct appeal, such "issues must meet a heightened showing before a court will grant relief. For alleged constitutional errors, '[a] petitioner has the burden of showing actual prejudice ...; for alleged nonconstitutional error, he must show a fundamental defect resulting in a complete miscarriage of justice.'" ***In re Personal Restraint of Yates***, 177 Wn.2d at 17. "Simply 'revising' a previously rejected legal argument, however, neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." ***In re Personal Restraint of Jeffries***, 114 Wn.2d at 488.

A personal restraint petitioner may re-assert or re-argue a previously decided issue if the interests of justice require re-litigation of that issue. ***In re Personal Restraint of Gentry***, 137 Wn.2d 378, 388-389, 972 P.2d 1250(1999), ***In re Personal Restraint of Lord***, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). The interests of justice are served by re-examining an issue if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. ***In re Personal Restraint of Stenson***, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). A petitioner

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cannot be allowed to institute appeal upon appeal and review upon review in forum after forum ad infinitum. ***In re Personal Restraint of Taylor***, 105 Wn.2d 683, 687-88, 717 P.2d 755 (1986). The appellate court should dismiss a petition if the prior appeal was denied on the same ground and the ends of justice would not be served by reaching the merits. *Id.*

There has been no showing that the interests of justice require reexamination of the ineffective assistance issue. The defendant has offered no justification for why the grounds now asserted were not included in the direct appeal. It can be argued in this case that to not dismiss this petition is to abandon any attempt to prevent personal restraint petitions from becoming routine second appeals.

Permitting a routine second appeal carries with it a number of problematic consequences. These include the disincentive for appellate counsel to bring forth all meritorious issues in the direct appeal. Saving issues for a personal restraint petition could become thought of as the gold standard of appellate practice if a second appeal is inevitably available. By saving issues the defendant reaps the benefit of having different panels of the appellate court review his case. This advantage is compounded by the ability to file a second petition for review and thus have a different panel of the Supreme Court likewise reconsider the issues. In sum, a second appeal undermines the interests of orderly appellate review of criminal cases without any corresponding benefit.

The ability to submit a second appeal also has the potential of doing injury to the esteem in which appellate review is held. If a second bite at the apple is to be tolerated, crime victims must be counseled that success on direct appeal means little. Those directly affected by violent crime stand to lose faith in the ability of the courts to deliver justice if a decision in a direct appeal can be so easily circumvented.

These are not minor consequences. The defendant's hope after his direct appeal has run its course is that a second look at the same issue will result in a different outcome.

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What could be more harmful to the integrity of appellate review than contradictory decisions in the same case? Disparate outcomes undermine public confidence in the integrity of the criminal justice system and the validity of appellate review.

In light of the comprehensive review of the trial court's proceedings in this case during the direct appeal and the petition for review, there are many good reasons to enforce stringent collateral attack procedural requirements. In the absence of any explanation for the appellate attorney not having included the issues sought to be raised in this petition in the direct appeal, the petition should be dismissed on this procedural ground.

2. THE PETITION SHOULD BE DISMISSED ON THE MERITS WHERE THE DEFENDANT HAS SATISFIED NEITHER THE PERSONAL RESTRAINT STANDARD NOR THE INEFFECTIVE ASSISTANCE STANDARD.

Without waiving or conceding the foregoing procedural arguments, the state also submits that the petition should be dismissed on the merits. To obtain relief in a personal restraint petition, the petitioner must show (1) actual and substantial prejudice resulting from alleged constitutional errors, or, (2) a fundamental defect that inherently results in a miscarriage of justice in case of alleged non-constitutional error. ***Matter of Cook***, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). "After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence." *Id.,* citing ***In re Personal Restraint of Hews***, 99 Wn.2d 80, 89, 660 P.2d 263 (1983). ***In re Personal Restraint of Borrero***, 161 Wn.2d 532, 536, 167 P. 3d 1106 (2007).

The personal restraint standards are purposefully onerous. However when the issue is ineffective assistance, the defendant's task doubly onerous. Exceptional deference must be given to counsel's tactical and strategic decisions in ineffective assistance cases. ***In re***

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Personal Restraint of Elmore, 162 Wn.2d 236, 257, 172 P.3d 335 (2007), citing ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984), ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)("Deficient performance is not shown by matters that go to trial strategy or tactics."). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." ***Strickland v. Washington***, 466 U.S. at 689. The defendant bears the burden of establishing "the absence of any conceivable legitimate tactic explaining counsel's performance." ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260, 1273 (2011), quoting ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

a. <u>The lesser included offense would not have been given if proposed in this case because the factual prong of the lesser included test was not sustained by substantial evidence.</u>

Insofar as the lesser included offense issue is concerned, it goes without saying that if the defendant was not entitled to a lesser included instruction, his trial counsel cannot have been ineffective for not having proposed one. Before a lesser included offense instruction can be given, the proponent must satisfy a two prong test. ***State v. Gamble***, 154 Wn.2d 457, 462–63, 114 P.3d 646 (2005). The first prong is legal and the state concedes that fourth degree assault satisfies the legal prong in a child molestation case. ***State v. Stevens***, 158 Wn.2d 304, 310, 143 P.3d 817, 821 (2006). The factual prong is another matter.

In order to satisfy the factual prong it is necessary that there be "substantial evidence" that "supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater one." ***State v. Edwards***, 171 Wn. App. 379, 399, 294 P.3d 708 (2012), citing ***State v. Fernandez–Medina***, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). Thus in this case this rule means that contact with an

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eight year old child's genitals by an unrelated adult male outside a care setting was an offensive touching and nothing more. On its face this seems absurd. Furthermore any suggestion that this was a mere offensive touching is laid to rest by the jury's determination beyond a reasonable doubt that the purpose of the contact was in fact sexual gratification.

Fourth degree assault "is an intentional touching that is harmful or offensive. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive." 11 Washington Practice: Washington Pattern Jury Instructions, Criminal No. 35.50. Sexual contact by contrast requires "touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires. . . ." Appendix E, Instruction 6. Comparison of the two crimes shows that the difference between them is in the parts of the body touched and the purpose served by the touching. For the touching in this case to have been nothing more than a fourth degree assault, it would be necessary to view an incident involving (1) an unrelated adult male, (2) who climbs into bed with an eight year old female, (3) who either pulls down her night clothing or puts his hand inside them in order to touch her genitals, and (4) who did so for his own sexual gratification, as nothing more than an offensive touching. This bizarre notion is belied not just by the jury's verdict but also by this Court's analysis of sufficiency of the evidence:

> Here, the evidence is less ambiguous than in [***State v. Powell***, 62 Wn.App. 914, 917, 816 P.2d 86 (1991)] and more similar to the touching in [***State v. Harstad***, 153 Wn.App. 10, 21, 218 P.3d 624 (2009)]. The State provided testimony that the touching occurred in AP's bed while she and the rest of the household slept. After AP felt Peebles touch her buttocks, she removed his hand from inside her shorts, only to again feel him touch her buttocks as well as her vaginal area. This touching is not capable of innocent explanation. *See* ***State v. Whisenhunt***, 96 Wn.App. 18, 24, 980 P.2d 232 (1999) (defendant's touching of victim's vaginal area three times was "not open to innocent explanation").

State v. Peebles, 192 Wn. App. 1058, 2016 WL 901091(2016)(Slip opinion, pp. 5-6).

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While fourth degree assault may be eligible as a lesser included offense in some cases, this case is not such a case. In the ***Stevens*** case the lesser included offense should have been given but only because the alleged touching was somewhat benign. ***State v. Stevens***, 158 Wn.2d 304, 311-312, 143 P.3d 817, 821 (2006). The victims in ***Stevens*** were teenagers who described and photographed an unwanted touching of the chest of a thirteen girl over the clothing in public by a defendant who was visibly drunk. *Id.* at 307. Under those specific circumstances, the Supreme Court held, "The evidence supports an inference that [the defendant] touched H.G. without privilege or consent, the touch was offensive, and therefore the touch was arguably unlawful. The factual prong of the inquiry is satisfied." *Id.* at 311-12.

This case is quite a bit different from ***Stevens***. The touching here, was not benign and thus "not open to innocent explanation." ***State v. Whisenhunt***, 96 Wn. App. at 24. It is also important to note that ***Stevens*** was not an ineffective assistance case. The defendant there sought but was denied the lesser included instructions. *Id.* While the case stands for the proposition that under the right circumstances fourth degree assault is available as a lesser included offense of child molestation, it certainly does not stand for the proposition that it is always available, nor that it will always be in the best interest of the defendant to request it.

b. <u>Even if the factual prong had been satisfied the defendant has not satisfied the personal restraint standard or the ineffective assistance standard</u>.

For the sake of argument, even if the Court were to assume that the factual prong was met in this case, neither the personal restraint standard nor the ineffective assistance standard has been satisfied. To satisfy those standards it is necessary that the defendant show (1) actual and substantial prejudice, and (2) the absence of any conceivable

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legitimate tactic explaining counsel's performance. ***Matter of Cook***, 114 Wn.2d at 813, ***State v. Grier***, 171 Wn.2d at 42. The defendant has not done so. This lack of evidence supports both that defense counsel was not ineffective and that any potential ineffectiveness was harmless. *See* ***State v. Humphries***, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014) ("Where an attorney does not request a limiting instruction regarding a prior conviction, courts have applied a presumption that the omission was a tactical decision to avoid reemphasizing prejudicial information . . . because we presume the action is a reasonable tactical decision, the failure to request a limiting instruction under the circumstances cannot establish an ineffective assistance of counsel claim.")

The lesser included offense would have posed a dilemma for trial counsel in this case. If counsel had argued in support of a lesser included verdict, he would have necessarily conceded that the defendant had engaged in an intentional act. The defendant would therefore have been at risk that the jury would accept the argument as a concession that the touching actually happened. A sexual assault defendant who concedes that an intentional, offensive touching in fact occurred would in in the mind of most juries have conceded sexual contact. Such a concession would be tantamount to an admission of guilt. Any defendant, not to mention the defendant in this case would rarely find it in his best interest to make such a concession.

The defendant seeks to avoid discussion of the implications of a lesser included offense by submitting a self-serving affidavit. In light of the lack of substantial evidence supporting fourth degree assault the attorney's alleged advice as described in the affidavit was actually spot on. Furthermore the affidavit is a text book example of evidence that is insufficient to sustain a personal restraint petition. It has been said in several cases that "bald assertions and conclusory allegations" do not justify personal restraint relief. ***In re Personal Restraint of Yates***, 177 Wn.2d 1, 17,296 P.3d 872 (2013), quoting ***In re***

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Personal Restraint of Rice, 118 Wn.2d 876, 885–86, 828 P.2d 1086 (1992). The assertion here is not supported by an affidavit from the trial attorney, nor by any reference to the record, nor any other admissible evidence. The defendant's belated allegation in his affidavit is all that has been submitted.

Not only is the defendant's allegation not supported but it is belied by the record. The defendant's trial strategy was no doubt dictated by his version of what happened. He claimed not to have a memory of the incident because he passed out. Appendix F, Exhibit A, p. 337. Thus he sought and obtained a voluntary intoxication instruction in the hope of establishing diminished capacity as to the mental element. Appendix E, Instruction 10. The defendant now claims that he would have wanted to argue for conviction of an intentional misdemeanor assault but that argument would have been wholly contradictory of his diminished capacity defense.

The defendant implausibly testified that he blacked out after consuming less than two beers. Appendix F, Exhibit A, p. 337. Since the defendant in theory could not remember what happened, his testimony supported a two pronged defense: (1) that the inappropriate touching had not occurred, or (2) that if it had occurred, it was an unintentional accident. Contrary to the defendant's belated argument in this petition, if the touching was unintentional, it could not have been an intentional assault.

The defendant's chosen defense was exploited effectively by his trial counsel during closing argument. He took advantage of both of the available arguments:

> The State has not proven this case. The initial statement made by [the victim] to her dad that he is just as consistent with another scenario, that Mr. Peebles goes to his bedroom, which he's slept in many times forgetting that [the victim] was there, climbs into bed, stretches out, accidentally puts his hand on [the victim]' bottom, wakes her up.
>
> * * * *
>
> After you listen and consider all the evidence, after you consider the law and what actually happened here, you'll find a doubt in this case that there was

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> not sexual contact, that there wasn't a touching of an intimate part of the body. And if there was a touching, it wasn't for purposes of sexual gratification. That it was an accident that, in fact, happened. It was unfortunate that it happened, but it wasn't what [the victim] perceived it to be.

Appendix F, Exhibit B, p. 379, 392.

The arguments advanced in this petition would have deprived the defendant of the either/or defense that he asserted at trial. They also would have deprived him of any claim that he acted without intent. The defendant was not entitled to and would not have wanted a lesser included fourth degree assault because he denied that the touching was intentional. Where the decision to pursue one or another of the available arguments is counsel's decision to make, counsel should not be second-guessed after the fact for having gone the only way he could have. ***Strickland v. Washington***, 466 U.S. at 689, ***State v. Grier***, 171 Wn.2d at 32. "As in *Grier,* [the defendant] and defense counsel 'could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.... That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis.'" ***State v. Edwards***, 171 Wn. App. 379, 400, 294 P.3d 708, 719 (2012), quoting ***State v. Grier,*** 171 Wn.2d at 43.

In this case the defendant's best hope was that the jury would accept his testimony that he would not have intentionally touched the victim in the manner in which she described. Appendix F, Exhibit A, pp. 315-16. The touching occurred twice under the victim's bed clothing and included the victim's genital area. ***State v. Peebles***, 192 Wn. App. 1058, 2016 WL 901091 (2016). "His hand was inside her shorts but outside her underwear. She moved his hand and went back to sleep. She awoke a second time when [the defendant] touched her in the same places and in her vaginal area." *Id.* This is a far cry from ***Stevens*** where the touching was over the clothing, on the chest and in a public

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place. ***State v. Stevens***, 158 Wn.2d at 307. Furthermore the incident in Stevens involved teenagers whereas here the victim was an eight year old girl who was sleeping in her own bed. *Id.* The defendant's intent in ***Stevens*** could be argued to have been innocent whereas the touching of the eight year old here could not. There was nothing ineffective in the decision not to request lesser included offense instructions even if the factual prong was somehow met.

c. As to an expert witness, the defendant has not satisfied the personal restraint standard or the ineffective assistance standard where he has not submitted evidence as to what the expert might have testified.

The defendant makes a similarly invalid argument concerning an expert witness. The only evidence submitted is the defendant's affidavit in which he professes not to have been aware that there are such things as intoxication experts. This bald assertion and conclusory allegation is no more sufficient than the allegation he makes concerning a lesser included offense. ***In re Personal Restraint of Yates***, 177 Wn.2d at 17, ***In re Personal Restraint of Rice***, 118 Wn.2d at 885-86. Neither the petition, nor the defendant's affidavit, nor the brief in support include an offer of proof or other showing as to what an expert witness might have been permitted to testify about in this case. For this reason alone the petition should be dismissed.

The defendant in this case testified without contradiction that he passed out and was thus unconscious at the time of the incident. Appendix F, Exhibit A, pp. 315-16. An expert might have testified that it is possible for a drinker to pass out but that was not in dispute. An expert would have added nothing of consequence to the defendant's case. Surely counsel's performance was not constitutionally deficient for not having offered testimony of such low probative value.

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Even if the defendant had supported his petition with a specific discussion of what an expert might have testified about, it is the height of speculation that such testimony would have been admitted. This Court has held that expert testimony about methamphetamine intoxication was properly excluded where it was speculative. ***State v. Lewis***, 141 Wn. App. 367, 389, 166 P.3d 786, 797 (2007). The analysis in ***Lewis*** is similar to the analysis that would have been employed in this case:

> Such speculative testimony is not rendered less speculative or of more consequence to the jury's determination simply because it comes from an expert. Expert testimony is admissible under ER 702 if (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact. . . Here, the testimony would not have helped the trier of fact; it would not have helped the jury determine whether [the victim] was the aggressor, as [the defendant] later contended. Because of the wide range of effects of various quantities of methamphetamine on diverse individuals, and because Dr. Ramos had never observed [the victim] alive, with or without methamphetamine in his system, Dr. Ramos had no idea how the methamphetamine might have affected [the victim]. And, therefore, his testimony could not have helped the jury.

Id.

The lack of an offer of proof in this case puts this Court in the position of speculating not only what the testimony might have been but whether it would have been admissible. Such speculation is fatal to any claim that the defendant has met either his personal restraint burden of proof or his ineffective assistance burden of proof as to the expert witness issue. For all that has been submitted in this case, an expert might have conceded that an individual in an alcoholic blackout state nevertheless has the capacity to act with intent or purpose and is more likely to have done so as a result of lessening of inhibitions. After all the mere fact that an event is not remembered does not prove that it did not happen or that it was unintentional. It is just as likely that an expert would have hurt the defendant's case rather than helped. This ground for relief, like the lesser included offense ground, is not sufficient to establish the defendant's entitlement of collateral relief.

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D. CONCLUSION:

For the foregoing reasons the state respectfully requests that the defendant's petition be dismissed.

DATED: Thursday, August 03, 2017

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB #17298

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/4/17 Johnston
Date Signature

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APPENDIX "A"

Judgment and Sentence

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KENNETH ARCHIE PEEBLES, Defendant.	CAUSE NO: 13-1-03732-9 WARRANT OF COMMITMENT 1) ☐ County Jail 2) ☒ Dept. of Corrections 3) ☐ Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

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[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 8/22/14

By direction of the Honorable

JUDGE
KEVIN STOCK

CLERK

By: T. [signature]
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date AUG 2 5 2014 By T. [signature] Deputy

FILED
DEPT. 22
IN OPEN COURT
AUG 2 2 2014
Pierce County Clerk
By [signature] DEPUTY

STATE OF WASHINGTON
ss.
County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, _____.

KEVIN STOCK, Clerk
By:_____ Deputy

SEAL OF THE SUPERIOR COURT OF PIERCE COUNTY WASHINGTON

PCU

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13-1-03732-9

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KENNETH ARCHIE PEEBLES

Defendant.

SID. 21463995
DOB: 09/22/1976

NCO

CAUSE NO. 13-1-03732-9

JUDGMENT AND SENTENCE (FJS)
[ ] Prison
[X] RCW 9.94A.712\9.94A.507 Prison Confinement
[ ] Jail One Year or Less
[ ] First-Time Offender
[ ] Special Sexual Offender Sentencing Alternative
[ ] Special Drug Offender Sentencing Alternative
[ ] Alternative to Confinement (ATC)
[ ] Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
[ ] Juvenile Decline [ ] Mandatory [ ] Discretionary

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on 7/18/14 by [ ] plea [X] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	CHILD MOLESTATION IN THE FIRST DEGREE (I39)	9A.44.083		07/16/13	131981145 UNIVERSITY PLACE PD

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the ORIGINAL Information

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

14-9-08288-7

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[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.2 **CRIMINAL HISTORY (RCW 9.94A.525):** NONE KNOWN OR CLAIMED

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 **SENTENCING DATA:**

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	X	51 – 68 TO LIFE		51 - 68 TO LIFE	LIFE

For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows:

2.4 [ ] **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:

[ ] within [ ] below the standard range for Count(s) _____.

[ ] above the standard range for Count(s) _____.

[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

[ ] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 [ ] **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9.41.010.

[ ] The court considered the following factors:

[ ] the defendant's criminal history.

[ ] whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

[ ] evidence of the defendant's propensity for violence that would likely endanger persons.

[ ] other: _____

[ ] The court decided the defendant [ ] should [ ] should not register as a felony firearm offender.

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III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ] The court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts

---

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN $ 489.19 Restitution to: VR9111

$ _____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV $ 500.00 Crime Victim assessment

DNA $ 100.00 DNA Database Fee

PUB $ _____ Court-Appointed Attorney Fees and Defense Costs

FRC $ 200.00 Criminal Filing Fee

FCM $ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

$ _____ Other Costs for: _____

$ _____ Other Costs for: _____

$ 1289.19 TOTAL

[X] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] shall be set by the prosecutor, if necessary

[ ] is scheduled for _____

[ ] RESTITUTION. Order Attached

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than $ Per CCO per month, commencing Per CCO. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[ ] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

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INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b **ELECTRONIC MONITORING REIMBURSEMENT.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of $_____.

4.2 [X] **DNA TESTING.** The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[X] **HIV TESTING.** The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 **NO CONTACT**

The defendant shall not have contact with A.P. 9/7/04 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life years (not to exceed the maximum statutory sentence).

[X] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 **OTHER**: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

Abide by formal NCO & all conditions of appendix H of PSI
Abide by all conditions CCO
No (unsupervised) contact with minors except the defendant's biological children with whom he can have unsupervised contact
Legal financial obligations, including restitution
Law abiding behavior
Register as sex offender per statute
Alcohol eval & psychosexual evaluation & follow up treatment

4.4a [X] All property is hereby forfeited

[ ] Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b **BOND IS HEREBY EXONERATED**

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4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

CONFINEMENT. RCW 9.94A.712/1507 Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count I Minimum Term: 58 Months Maximum Term: Life

Count _____ Minimum Term _____ Months Maximum Term: _____

Count _____ Minimum Term _____ Months Maximum Term: _____

The Indeterminate Sentencing Review Board may increase the minimum term of confinement.

Actual number of months of total confinement ordered is: 58 months to life

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[ ] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: subject to DOC calculation

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4.6 [ ] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[ ] **COMMUNITY CUSTODY** (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) _____ 36 months for Serious Violent Offenses

Count(s) _____ 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

[X] **COMMUNITY CUSTODY** is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Count I until _____ years from today's date [X] for the remainder of the Defendant's life.

Count _____ until _____ years from today's date [ ] for the remainder of the Defendant's life.

Count _____ until _____ years from today's date [ ] for the remainder of the Defendant's life.

(B) While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The court orders that during the period of supervision the defendant shall:

[X] consume no alcohol.

[X] have no contact with: A.P. & ~~[redacted]~~ - D may have supervised contact w/minors

[ ] remain [ ] within [ ] outside of a specified geographical boundary, to wit: & unsupervised contact with his biological children

[X] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[X] participate in the following crime-related treatment or counseling services. Per CCO

[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

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[ ] comply with the following crime-related prohibitions: _____

_____

[X] Other conditions:
Per CCO

_____

_____

[ ] For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

_____

_____

_____

_____

CONFINEMENT. RCW 9.94A.712 1507 Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count _____ Minimum Term: _____ Months Maximum Term: _____

Count _____ Minimum Term _____ Months Maximum Term: _____

Count _____ Minimum Term _____ Months Maximum Term: _____

The Indeterminate Sentencing Review Board may increase the minimum term of confinement. [ ]

COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Count _____ until _____ years from today's date [ ] for the remainder of the Defendant's life.

Count _____ until _____ years from today's date [ ] for the remainder of the Defendant's life.

Count _____ until _____ years from today's date [ ] for the remainder of the Defendant's life.

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V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

N/A

5.8 [ ] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

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5.10 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 8/22/14

JUDGE
Print name: John R. Hickman

Deputy Prosecuting Attorney
Print name: Angelica Williams
WSB # 36673

Attorney for Defendant
Print name: GREG GIRARD
WSB # 11035

Defendant
Print name: Kenneth A. Pebley Jr.

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: _____

FILED
DEPT. 22
IN OPEN COURT
AUG 22 2014
Pierce County Clerk
By _____ DEPUTY

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 13-1-03732-9

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER
Emily Dirton
_____
Court Reporter

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

13-1-03732-9

IDENTIFICATION OF DEFENDANT

SID No. 21463995 (If no SID take fingerprint card for State Patrol)

Date of Birth 09/22/1976

FBI No. 758813WD3

Local ID No. 992180016

PCN No. 541237437

Other

Alias name, SSN, DOB: _____

Race:						Ethnicity:		Sex:	
[ ]	Asian/Pacific Islander	[ ]	Black/African-American	[X]	Caucasian	[ ]	Hispanic	[X]	Male
[ ]	Native American	[ ]	Other: :			[X]	Non-Hispanic	[ ]	Female

FINGERPRINTS

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously

I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, _____ Dated: _____

DEFENDANT'S SIGNATURE: _____

DEFENDANT'S ADDRESS: _____

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APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

__X__ sex offense Child Molest 1
_____ serious violent offense
_____ assault in the second degree
_____ any crime where the defendant or an accomplice was armed with a deadly weapon
_____ any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

_____ (I) The offender shall remain within, or outside of, a specified geographical boundary: _____

_____

__✓__ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: Minors

_____

_____ (III) The offender shall participate in crime-related treatment or counseling services;

__✓__ (IV) The offender shall not consume alcohol; _____

__✓__ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

__✓__ (VI) The offender shall comply with any crime-related prohibitions.

__✓__ (VII) Other: Per CCO

_____

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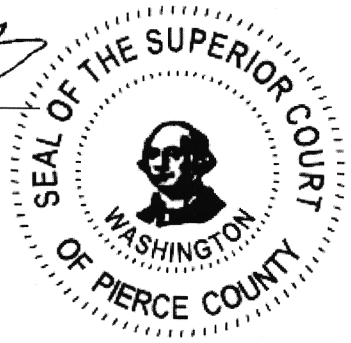
Telephone: (253) 798-7400

Case Number: 13-1-03732-9 Date: August 3, 2017
SerialID: 2C0D1534-354F-4309-A96AB6D1956FA19B
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 03 day of August, 2017

Kevin Stock, Pierce County Clerk

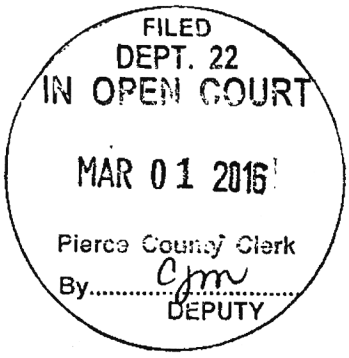
By /S/Rebecca Ahquin, Deputy.
Dated: Aug 3, 2017 2:28 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: 2C0D1534-354F-4309-A96AB6D1956FA19B**.
This document contains 14 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "B"

Unpublished Opinion



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. PEEBLES, JR, KENNETH ARCHIE, Defendant.	Cause No. 13-1-03732-9 COURT OF APPEALS DIVISION II UNPUBLISHED OPINION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH ARCHIE PEEBLES, JR.	No. 47392-5-II UNPUBLISHED OPINION

MELNICK, J. – Kenneth Archie Peebles, Jr. appeals his conviction of child molestation in the first degree. We hold that sufficient evidence existed to show that Peebles engaged in sexual contact with the victim and that an inadvertent reference to DNA[1] evidence did not result in prejudice. Additionally, the prosecuting attorney argued legitimate inferences from the evidence during closing argument and any misstatements were not prejudicial. Finally, defense counsel's decision not to object to the DNA reference and the prosecuting attorney's closing argument did not constitute ineffective assistance, and that cumulative error did not deprive Peebles of a fair trial. We affirm his conviction.

[1] Deoxyribonucleic acid.

FACTS

When Peebles arrived at Jeremy Parrish's home to pick up some mail, Parrish invited his longtime friend to dinner. Parrish's eight-year-old daughter AP was staying with her father and knew Peebles. Peebles and Parrish drank home brewed beer and they eventually decided that Peebles should stay the night because he had been drinking.

AP went to bed before the adults. She wore shorts, underwear, and a T-shirt to bed. AP awoke when she felt Peebles lie down beside her. He laid on his side facing her back. AP felt Peebles's hand touching her buttocks and the area below her hip. His hand was inside her shorts but outside her underwear. She moved his hand and went back to sleep. She awoke a second time when Peebles touched her in the same places and in her vaginal area.

AP then got out of bed and woke her father. When she told him what Peebles had done, Parrish got up and found Peebles asleep in another room. Parrish woke Peebles and drove him home. Peebles seemed unsteady but entered his house unassisted.

The next day Parrish told AP's mother about the incident and she called the police. AP described the touching to her mother and to professionals who examined and interviewed her.

The State charged Peebles with child molestation in the first degree. It sought to introduce DNA evidence obtained from AP's shorts that revealed two separate male DNA profiles; however, the defense moved before trial to exclude that evidence because the DNA test concluded that "the sample was not suitable for comparison purposes." Clerk's Papers (CP) at 27. The trial court granted the motion to exclude any reference to DNA evidence.

At trial, AP and her parents testified to the facts cited above. AP's mother also testified that AP told her that Peebles touched her buttocks twice. Parrish stated that AP told him that Peebles crawled into bed with her and pulled down her pants twice, though he admitted telling a

deputy that AP said Peebles pulled her pants down once. Parrish also told the deputy that AP denied being touched in her private parts.

Deputy Jason Smith testified about going to Parrish's house and collecting the clothing that AP had worn to bed. This clothing was placed into three envelopes that were admitted into evidence. When the prosecutor asked Smith to identify the contents of each envelope, she also asked about the contents of a packet in the first envelope. Smith replied, "It's some sort of test, DNA test." IV Report of Proceedings (RP) at 174. The prosecutor then asked about the second envelope without further reference to DNA.

After excusing the jury for the day, the trial court addressed the DNA issue sua sponte. The prosecutor apologized for the inadvertent reference to DNA evidence, explaining that she had no idea that the DNA test was in the packet. The prosecutor added that the defense was entitled to a limiting instruction. After considering the matter overnight, defense counsel decided against an instruction that would highlight the DNA issue.

A deputy prosecutor who attended an interview with AP testified that the child stated Peebles had touched her "chest, bottom, and front." V RP at 293. Peebles testified that after drinking two high-alcohol beers with Parrish, he could only remember eating dinner and then waking up in his own home the next morning. He stated that he was shocked when Parrish told him about AP's allegations, but he explained that he could not deny molesting AP because of his intoxication that evening.

The jury found Peebles guilty as charged and the trial court imposed a standard range sentence of 58 months. Peebles appeals his conviction.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Peebles argues that insufficient evidence existed to prove that he touched AP for the purpose of sexual gratification. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In determining whether the necessary quantum of proof exists, we need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

To convict Peebles of child molestation in the first degree, the jury had to find beyond a reasonable doubt that he had sexual contact with AP, that AP was less than 12 years old at the time and not married to Peebles or in a domestic partnership with him, that AP was at least 36 months younger than Peebles, and that the act occurred in Washington. The trial court instructed the jury that "[s]exual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP at 70 (Instr. 6). Sexual gratification

is not an essential element of the crime of child molestation in the first degree. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Rather, it is a definitional term that clarifies the meaning of sexual contact. *Lorenz*, 152 Wn.2d at 36.

"'Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification,'" although courts require additional proof of sexual purpose when clothes cover the intimate part touched. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (quoting *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991)). Peebles does not dispute that the touching of AP occurred on her intimate parts. *See In re Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979) (buttocks, hips and lower abdomen may be intimate parts of the anatomy). He argues, however, that the State failed to provide the additional proof needed to establish that the touching occurred for the purpose of sexual gratification.

The *Harstad* court held such proof existed because the defendant rubbed the victim's upper thigh back and forth while engaging in heavy breathing. 153 Wn. App. at 22-23. This touching occurred at night while everyone else in the household slept. *Harstad*, 153 Wn. App. at 21. But we concluded in *Powell* that the purpose of the defendant's fleeting touches of the victim's chest, bottom, and thighs was equivocal and capable of innocent explanation. 62 Wn. App. at 917-18. This touching occurred as the defendant hugged the victim, lifted her off his lap, and sat with her in his truck. *Powell*, 62 Wn. App. at 917-18. The evidence was insufficient to support the inference that this touching outside the victim's clothing occurred for the purpose of sexual gratification. *Powell*, 62 Wn. App. at 918.

Here, the evidence is less ambiguous than in *Powell* and more similar to the touching in *Harstad*. The State provided testimony that the touching occurred in AP's bed while she and the

rest of the household slept. After AP felt Peebles touch her buttocks, she removed his hand from inside her shorts, only to again feel him touch her buttocks as well as her vaginal area. This touching is not capable of innocent explanation. *See State v. Whisenhunt*, 96 Wn. App. 18, 24, 980 P.2d 232 (1999) (defendant's touching of victim's vaginal area three times was "not open to innocent explanation"). For the foregoing reasons, sufficient evidence existed to establish an inference that the touching of the victim's intimate areas over her clothing occurred for the purpose of sexual gratification.

II. PROSECUTORIAL MISCONDUCT

Peebles next argues that the prosecutor committed misconduct during direct examination of a witness and during closing argument, and that this misconduct deprived him of a fair trial. We disagree.

A defendant has a fundamental right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct can deprive a defendant of this constitutional right. *Glasmann*, 175 Wn.2d at 703-04.

To prevail on a prosecutorial misconduct claim, a defendant must prove that the prosecutor's conduct was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. Prejudice is established if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). If the defendant did not object at trial, he is deemed to have waived any error unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

A. Disclosure of DNA Evidence

Peebles argues that the prosecutor should have realized that her question to Deputy Smith about the contents of a packet inside an exhibit would elicit prohibited testimony about DNA test results. The State responds that after the inadvertent remark about the fact of a DNA test occurred, the parties and the court took the appropriate remedial steps to eliminate the possibility of any further DNA reference and thereby eliminated any potential prejudice. We agree with the State.

Although defense counsel did not object when Deputy Smith testified that the packet contained "some sort of test, DNA test," the trial court addressed the issue sua sponte. IV RP at 174, 176. The prosecutor apologized and explained that she had no idea that the DNA test was in the packet, thinking instead that it might have contained the victim's barrette. Both the trial court and defense counsel accepted her explanation and admitted that they had thought it was a dehumidifier packet. The court and the parties subsequently removed the DNA test and relabeled the exhibit.

We decline to find misconduct in the inadvertent violation of the trial court's pretrial ruling excluding DNA evidence.[2]

B. Closing Argument

Peebles's remaining claims of prosecutorial misconduct concern statements made during closing argument. Peebles complains that in five separate instances, the prosecutor personally vouched for AP's credibility, expressed her personal knowledge of the facts of the case, and impugned Peebles's credibility.

[2] The witness merely mentioned a DNA test. The actual test and its conclusions were never revealed to the jury.

We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). "'A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.'" *Jones*, 144 Wn. App. at 290 (quoting *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)).

It is improper for a prosecutor personally to vouch for the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Vouching is not based on evidence and occurs when the prosecutor places the government's prestige behind the witness or indicates that information not presented to the jury supports the witness's testimony. *State v. Allen*, 161 Wn. App. 727, 746, 255 P.3d 784 (2011). "Just as it is improper for a prosecutor personally to vouch for the credibility of a witness, it is improper for a prosecutor to personally vouch against the credibility of a witness." *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003) (internal quotation marks omitted). But prejudicial error will not be found unless it is "'clear and unmistakable' that counsel is expressing a personal opinion" rather than arguing an inference from the evidence. *Brett*, 126 Wn.2d at 175 (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). A prosecutor may freely comment on witness credibility based on the evidence. *Allen*, 161 Wn. App. at 746.

Peebles argues that the prosecutor vouched against his credibility in two sets of comments that occurred during the first part of her closing argument. The first set is as follows:

> [PROSECUTOR]: What does alcohol not do? It does not make a criminal act not criminal. Claims of alcoholic blackout are self-reported. They obviously have an insensitive [sic], and they're seeking to avoid responsibility for their deviant behavior. This claim of alcoholic blackout is a farce. Being drunk is one thing. What he's claiming is something entirely different, that after two beers he blacks out, can't remember anything. That's just ridiculous, ladies and gentlemen. It's the claim--
>
> [DEFENSE COUNSEL]: I'd object to that characterization, Your Honor.
>
> [THE COURT]: It's argument, Counsel. Your objection is noted for the record.
>
> [PROSECUTOR]: The defendant's claim and his version is ridiculous, and it's not supported by the evidence in any single way.

VI RP at 377.

During opening statement, defense counsel told the jury that Peebles drank so much that night that he was incoherent and passed out in the bed in which Parrish found him. Peebles testified that he was so intoxicated that he could not remember what happened after dinner on the night in question. The trial court instructed the jury that while evidence of voluntary intoxication does not make an act less criminal, the jury could consider intoxication in determining whether Peebles acted for the purpose of satisfying either party's sexual desires.

The State's argument was a comment on the defense's theory and on Peebles's credibility that was based on the evidence and the total argument. *See State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996) (use of word "liar" as comment on defendant's credibility was not improper where prosecutor was drawing inference from evidence). Even if the references to the defense theory as a farce and as ridiculous were improper, they were not prejudicial. It was not clear that the prosecutor expressed a personal opinion rather than drawing an inference from the evidence. *See Horton*, 116 Wn. App. at 921 (misconduct was unmistakable where prosecutor told jury that he believed the defendant lied).

Peebles next complains of this statement:

> So at the end of this, ladies and gentlemen, do you have an abiding belief in the truth of this charge? Do you have an abiding belief that [AP is] telling the truth? Do you have an abiding belief that when [AP] sat on the stand on Tuesday and she looked at you and told you what happened to her, did you believe her? And there's no reason not to.

VI RP at 378. Defense counsel did not object to this statement. We view this argument as a comment based on the evidence that did not constitute misconduct.

Peebles also complains of statements made during the State's rebuttal argument. The first began with a reference to Peebles and his ability to leave the Parrish home, set his alarm at his own home, and proceed with his normal routine the following day despite his alleged intoxication.

> He has that ability to understand [Parrish's] instructions, to get out of Dodge after he's been caught and to feign intoxication because he's trying to avoid criminal responsibility, just like he did yesterday when he testified and this morning when he testified. Because he's trying to evade criminal responsibility for what he did to [AP].
>
> [Defense counsel] said--was discussing a scheme, this scheme that he had that he concocted and how that . . . was sort of a silly idea. Well, frankly, the defendant's scheme almost worked. If it wasn't for [AP's mother], we wouldn't be here. Jeremy Parrish wasn't going to call law enforcement. He didn't call law enforcement. [AP's mother] called law enforcement. So quite frankly, [Peebles's] scheme, it almost worked. And it almost worked because of the 20-year relationship he has with a man who is like his brother.

VI RP at 393-94.

Defense counsel did not object. The statements are based on inferences from the evidence as well as defense counsel's closing argument where he argued that one act of accidental touching from a drunken man did not constitute sexual contact. We see no misconduct in the statements highlighted above.

Finally, Peebles complains of this statement: "Voluntary intoxication, this is the defendant's attempt just to evade justice." 6 RP 397. Again, defense counsel did not object. Because it is not clear and unmistakable that the prosecutor was asserting her personal opinion rather than arguing an inference from the evidence, we reject this claim of misconduct as well. Peebles's argument that prosecutorial misconduct deprived him of a fair trial fails.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Peebles argues that he received ineffective assistance of counsel when his attorney failed to object to the above statements and to the prosecutor's elicitation of DNA testimony. We disagree.

To prove a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that this deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Prejudice results when it is reasonably probable that but for counsel's errors, the result of the proceeding would have been different. *Thomas*, 109 Wn.2d at 226. We strongly presume that defense counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We need not address both prongs of the ineffective assistance of counsel test if the defendant makes an insufficient showing on one prong. *State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). Because claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

When counsel's strategy can be characterized as legitimate trial strategy, it cannot provide a basis for an ineffective assistance of counsel claim. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d

512 (1999). The decision of whether to object is a clear example of trial strategy. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on an ineffective assistance of counsel claim based on the failure to object, the defendant must show (1) an absence of legitimate strategic or tactical reasons for failing to object; (2) that the objection likely would have been sustained if raised; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Having already held that the deputy's statement about the DNA test was not prejudicial error in the context of Peebles's prosecutorial misconduct claim, we need not repeat that analysis in this context. And, having held that none of the closing argument statements to which defense counsel did not object constituted misconduct, we cannot conclude that counsel's failure to object was deficient. *See In re Pers. Restraint of Cross*, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (defense counsel's failure to object to prosecutor's closing argument generally will not constitute deficient performance). We reject Peebles's claim of ineffective assistance of counsel.

IV. CUMULATIVE ERROR

Finally, Peebles argues that the cumulative effect of the errors he has identified deprived him of a fair trial. We disagree.

Under the cumulative error doctrine, a reviewing court may reverse a defendant's conviction when the combined effect of trial errors denied him a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *Weber*, 159 Wn.2d at 279. We see no accumulation of error that deprived Peebles of a fair trial, and we reject his claim of cumulative error.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, P.J.

Sutton, J.

Case Number: 13-1-03732-9 Date: August 3, 2017
SerialID: 57070417-3758-4D01-917D21F929A22EEA
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 03 day of August, 2017

Kevin Stock, Pierce County Clerk

By /S/Rebecca Ahquin, Deputy.
Dated: Aug 3, 2017 2:28 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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APPENDIX "C"

Supreme Court Order

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	No. 92955-6
Respondent,	)	**ORDER**
v.	)	C/A No. 47392-5-II
KENNETH ARCHIE PEEBLES, JR.,	)	
Petitioner.	)	

A Special Department of the Court, composed of Chief Justice Madsen and Justices Johnson, Owens, Stephens and Yu, considered at its August 2, 2016, Motion Calendar, whether review should be granted pursuant to RAP 13. 4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington, this 3rd day of August, 2016.

For the Court

Madsen, C.J.
CHIEF JUSTICE

Please file.

APPENDIX "D"

Mandate—COA No. 47392-5

Please sched. hrg re: costs.

T.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ARCHIE PEEBLES, JR,

Appellant.

No. 47392-5-II

MANDATE

Pierce County Cause No. 13-1-03732-9

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on March 1, 2016 became the decision terminating review of this court of the above entitled case on August 3, 2016. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor: State of Washington, Pierce County: $5.91
Judgment Creditor: Appellate Indigence Defense Fund: $1,472.99
Judgment Debtor: Kenneth Archie Peebles, Jr., $1,478.90

SEAL OF THE COURT OF APPEALS • STATE OF WASHINGTON •

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 27th day of September, 2016.

Clerk of the Court of Appeals,
State of Washington, Div. II

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Hon. John R Hickman
Pierce Co Superior Court Judge
930 Tacoma Ave South
Tacoma, WA 98402

Case Number: 13-1-03732-9 Date: August 3, 2017
SerialID: A7E029F5-9E1F-4D65-A349954EC195BCA0
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 03 day of August, 2017

Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Aug 3, 2017 2:47 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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This document contains 2 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "E"

Court's Instructions to the Jury

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KENNETH ARCHIE PEEBLES, JR. Defendant.	CAUSE NO. 13-1-03732-9

COURT'S INSTRUCTIONS TO THE JURY

DATED this 17 day of July, 2014.

The Honorable John R. Hickman

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 8

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

A person commits the crime of child molestation in the first degree when the person has sexual contact with a child who is less than twelve years old, who is not married to the person and not in a state registered domestic partnership with the person, and who is at least thirty-six months younger than the person.

INSTRUCTION NO. 6

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

INSTRUCTION NO. 1

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

INSTRUCTION NO. 8

"State registered domestic partners" means two persons who are: (1) at least eighteen years of age; (2) who share a common residence; (3) who are not married to someone other than the party to the domestic partnership and neither person is in a state registered domestic partnership with another person; (4) who are both capable of consenting to the domestic partnership; (5) who are not nearer of kin to each other than second cousins and neither person is a sibling, child, grandchild, aunt, uncle, niece, or nephew to the other person; (6) either both persons are members of the same sex or at least one of the persons is sixty-two years of age or older; and (7) and who have been issued a certificate of state registered domestic partnership by the secretary.

A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction and that is substantially equivalent to a Washington domestic partnership, is treated the same as a domestic partnership registered in this state regardless of whether it bears the name domestic partnership.

INSTRUCTION NO. 9

To convict the defendant of the crime of child molestation in the first degree as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of July, 2013, the defendant had sexual contact with A.P.;

(2) That A.P. was less than twelve years old at the time of the sexual contact and was not married to the defendant and not in a state registered domestic partnership with the defendant;

(3) That A.P. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted for the purpose of gratifying sexual desires of either party.

INSTRUCTION NO. 11

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 12

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

Case Number: 13-1-03732-9 Date: August 3, 2017
SerialID: 32172844-87AC-442B-BE31FF91500FDA18
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 03 day of August, 2017

Kevin Stock, Pierce County Clerk

By /S/Melissa Jaso, Deputy.
Dated: Aug 3, 2017 3:20 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: 32172844-87AC-442B-BE31FF91500FDA18**.
This document contains 16 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "F"

Declaration of James Schacht

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH ARCHIE PEEBLES, JR. Appellant.	NO. 50172-4 DECLARATION OF JAMES SCHACHT

JAMES SCHACHT declares as follows:

1. I am an attorney licensed to practice in the State of Washington and am employed as a deputy prosecutor for Pierce Count and have been assigned to this case.

2. Attached as Exhibits A and B are true and correct copies of excerpts from the verbatim reports from the appellant's direct appeal, No. 47392-5:

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Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

EXHIBIT	DESCRIPTION
A	Volume V, pp. 300-316 and Volume VI, pp. 324-40, the trial testimony of the defendant.
B	Volume VI, pp.379-392, the closing argument of trial defense counsel.

I HEREBY DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THS STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated: Friday, August 4, 2017
Place Signed: Tacoma, WA.

JAMES SCHACHT
WSB # 17298

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ and or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/4/17 D Johnson
Date Signature

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

EXHIBIT “A”

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. KENNETH A. PEEBLES, JR., Defendant.	Superior Court No. 13-1-03732-9 Court of Appeals No. 47392-5-II

VERBATIM TRANSCRIPT OF PROCEEDINGS
VOLUME V

July 16, 2014
Pierce County Courthouse
Tacoma, Washington
Before the Honorable JOHN R. HICKMAN

DIRECT EXAMINATION

BY MR. GIRARD:

Q. And, Mr. Peebles, how are you employed?

A. I'm active duty US Army assigned to Ft. Lewis, Second Stryker Brigade.

Q. What do you do for Second Stryker?

A. I work as an electromagnetic spectro manager in part of the electronic warfare cell at the brigade headquarters.

Q. What does that mean?

A. Mostly I consult the electronic warfare officers on the effects of how radio waves actually work as they're moving their atmosphere and the transmitters and the receivers and kind of how all that goes. Anything that transmits a radio signal is sort of in my lane.

Q. How long have you been doing that?

A. Since November 2010.

Q. When did you first join the military?

A. In June 1995.

Q. When did you graduate from high school?

A. In May '95.

Q. Where did you go to high school?

A. At Colony High School in Palmer, Alaska.

Q. Did you know Mr. Parrish there?

A. Yes. We went together -- we went to high school from '91 to '95. We didn't really associate a whole lot until about '93, the beginning of our junior year, and we were pretty much inseparable after that.

Q. And did he also join the military after high school?

A. Yes. He was a few months afterwards -- or maybe a few weeks. He signed his contract later. I signed mine before my senior year, so he got a different date. We went to -- ended up at the same -- doing the same job. We were both infantry, so we went to Ft. Benning for training. He ended up at Second Ranger Battalion here in Ft. Lewis, and I ended up at Third Ranger Battalion down at Ft. Benning, Georgia.

Q. How long did you stay in the military at that point?

A. At that point I completed my initial four-year contract, and once I was done, Jer offered to have me move in with him.

Q. Were you still at Ft. Benning when --

A. No. At the time I was actually at Ft. Bragg for about my last year, I think, it was.

Q. You talked to Mr. Parrish, and he offered to have you live with him?

A. Yeah.

Q. Where was he?
A. He was still up here. He was stationed at Ft. Lewis on active duty. He had about a few more months left on his contract, and he had planned to get out also. And Washington was kind of in the middle of my family, which is partially in Alaska. The rest is in Arkansas and Tennessee. I figured this was kind of as good a place as any to come.
Q. When was that?
A. That was -- May '99 I ETS'd or completed my contract. I got my paperwork and drove across country.
Q. You began to live with Mr. Parrish at that time?
A. Yeah. It was -- I took my time. It was six or eight weeks visiting people and driving across the country and then, yeah, showed up and moved right in with Jeremy and Angie.
Q. So when was that?
A. That would have been -- it was by June or July '99.
Q. And Mr. Parrish was done with his duty a few months later?
A. Yeah. Somewhere around that fall, I think.
Q. What did you do at that point?
A. Both of us joined the Washington National Guard. He was running a Take Won Doe school for a while. I

went straight to TCC to start college. And, I mean, we had odd jobs here and there or we were going to school and doing the National Guard work.

Q. Did you eventually leave Washington?

A. Yes. It was quite a bit later. I separated completely from the National Guard in 2002 when the -- when the entire contract was again completed. So I had a break in service about four years, and Jeremy stayed in the military, I think, in the Guard. I came back in to the reserves in 2006 and then October 20, 2007, I came back on active duty.

Q. And during that time -- when did you leave Washington then?

A. It was October 20th of 2009. I mean, I had to come back, pick up my household goods and wife and kid and stepson, and we moved to Ft. Meek, Maryland.

Q. During the time before that, did you continue to live with Jeremy?

A. For quite a while. It was from '99 until '03 or '04. I think the beginning of '04 is accurate.

Q. At one point did you buy a house together?

A. Yes. The house that -- on Robin Road in University Place.

Q. Where Mr. Parrish still lives?

A. Yes.

Q. And did you and your wife live there at the same time?
A. Yes.
Q. With the Parrishes?
A. Yeah.
Q. And do you have a child?
A. Yes. Evan, he's 20 days younger than Alexis.
Q. So when you left in 2009, where were you stationed?
A. In 2009, I was working at the NSA headquarters in Ft. Meade.
Q. What were you doing there? Can you say what you were doing there?
A. Well, not exactly. I mean, I can give you --
MS. WILLIAMS: Objection --
A. -- a description of my --
MS. WILLIAMS: -- to relevance of his job description in Maryland.
THE COURT: I'll sustain the objection.
Q. What kind of work were you doing there?
MS. WILLIAMS: Objection, same objection.
THE COURT: He can state in a general viewpoint what he was doing there.
A. For -- I was still on active duty in the army, and I was a microwave communication systems operator/ maintainer, and that is the slot I filled for the

NSA job.

Q. While you were stationed there, did you come back to Tacoma at all?

A. Several times. Both before -- I got divorced in 2009, so both before and after. We come back -- when I was married, my wife has family here, ex-wife. So we come back to visit them every once in a while. And finally after we separated, she moved back here. So pretty much every trip after that when I took leave, I came back here to visit my son.

Q. Where did you stay during that period of time?

A. I stayed at Jer's house.

Q. How many times do you think?

A. Probably close to a dozen times that I stayed there. Several dozen nights, I think.

Q. Over what period of time?

A. Would have been from probably winter or Christmas time 2009 until I got stationed here finally in May 2012, June, June 2012 -- or, sorry, '13.

Q. And when you were staying at Mr. Parrish's house, what bedroom did you sleep in?

A. It just depended on what was going on and who was visiting. He has a very active social life. He's got family and friends that -- people from the

military that come and visit. So, I mean, if -- it just depends on what was going on. I've slept in every room in the house, in the couch. Most of the time recently it's been in Alexis' room when she's not there. That's, as he said, was the main guest bedroom. The other bedroom didn't always have furniture in it, so sometimes it was furnished, sometimes it wasn't.

Q. So you're stationed here in July of last year?

A. Correct.

Q. On July 16th did you go to Mr. Parrish's house?

A. Yes.

Q. Why?

A. To pick up mail.

Q. Why did you have mail there?

A. Because I started -- I mean, we've been friends forever. He's let me -- I've used his address since I lived there, for the most part, for things. It's a consistent address for when I'm moving around with the Army and stuff. So I probably started forwarding mail some time when I was deployed to Kuwait, I think, I started anticipating the move. So I always had plenty of mail to pick up there on a regular basis.

Q. When you moved back here, where you living?

A. I lived with him initially.
Q. How long did you live with him?
A. For -- it was right about a month. I got here at the very end of May, probably second week, end of the second week of May, something like that. I believe I closed on my house the beginning of June, like second week of June. It wasn't any more than six weeks.
Q. So you bought a house?
A. Yeah.
Q. And were you intending to stay at Mr. Parrish's that night?
A. Not until the beer drinking started, no. I didn't -- did not intend to stay there that night when I went over there.
Q. What kind of beer were you drinking?
A. It was a homemade brew. Like he said, it was -- it was actually the third attempt at recreating a specific beer from Stone Brewing. It was an IPA, India Pale Ale. We brewed the third batch to have as high alcohol as content as possible and as much flavor, be as bitter as we could -- as we could make it.
Q. You said "we." Who's we?
A. Me and Jer. We both worked on it together. There

was another beer that he had there that was a lighter beer that he brewed by himself there. That was his -- kind of his specialty beer. Good for summertime, so we had both of those.

Q. And when you say high alcohol content, what were you shooting for?

A. Well, the beer we were trying to recreate, I believe, was about 11.2 percent. And I think we tweaked the ingredients to try and increase that. There wasn't really a specific goal for a number. We didn't -- I don't think we took very good measurements on -- to measure the alcohol, so I couldn't tell you exactly what it was.

Q. Is 11 percent a high level of alcohol for beer?

A. Yes. Typically, I mean, it depends on where you go. Up here, I guess, five or so is pretty normal. If you go down south other places, it's like two and a half percent.

Q. You began drinking beer. Do you know how much you drank?

A. I don't. I don't remember anything after the steak.

Q. How long were you there before you prepared and ate the steak?

A. Probably wasn't more than two hours. I think I left work around 4:00 or so. It takes about ten or

15 minutes to get to his house going through the back gate of Ft. Lewis. So I was there probably not long after 4:00 and started drinking immediately.

Q. At some point you decided to spend the night?

A. Yeah. I have no idea when that decision was made. It was probably before the second beer or so. He let me borrow a pair of his shorts since the only thing I had to wear was my uniform. So I was wearing my T-shirt and a pair of his -- his shorts. So it was probably the first or second beer that we decided that, I guess.

Q. You remember eating the steak?

A. Yes.

Q. What do you remember after that?

A. I woke up the next morning. My cell phone was plugged in. My alarm was going off. I still had his shorts on, and I had to get to -- it was 5:00 in the morning. I had to get to PT.

Q. Where were you?

A. I was at my house in my bed.

Q. When you say your alarm went off, had you set the alarm that night?

A. No. It's set to go off weekdays at 5:00. It was plugged in, so the battery wasn't dead, which probably would have happened if I hadn't plugged it

in.

Q. Did you -- how did you feel?

A. Still drunk, still pretty intoxicated.

Q. And did you discover any injuries on yourself?

A. Yeah. My forearm, elbow was scraped up, bruised, sore.

Q. Was that there prior to going to Mr. Parrish's house?

A. No.

Q. Do you recall how that happened?

A. No idea.

Q. So what did you do when you got up?

A. I did the same thing I do every morning. Shave, brush my teeth, grab my bag, and I go straight out the door. I've got -- my commute is timed so that, you know, I'm in my house less than ten minutes. I grab my bag and I go. My bag wasn't packed correctly. It was packed with all the same stuff I was wearing before, dirty clothes pretty much. So I had to finish PT and then come back to work because I would normally just shower at the office.

Q. When you say "PT" --

A. Physical training. We've got an hour and a half of working out to do every morning.

Q. What did you do that morning?

A. It was about an eight-mile run.
Q. How did that go?
A. I was pretty numb through most of it. I think I only sobered up about the end, probably mile six or seven.
Q. So after you ran, you went back home?
A. Yep. Went home, changed, showered, did all that stuff. I was -- I was always -- I'm in a hurry doing that because I really don't have enough time to get from Ft. Lewis to Puyallup and back with any guarantee of successfully making it to work on time.
Q. At some point did you communicate with Mr. Parrish?
A. On the way back to work, I sent him a text message while I was driving, asking him -- I think I just asked him why and how I got home.
Q. And did he respond?
A. He called me a few seconds later.
Q. What did he say?
A. He said -- well, initially I think the first thing he said was that he drove me home, and I asked him why.

MS. WILLIAMS: I would object to anything Mr. Parrish said as hearsay.

MR. GIRARD: It's not for the truth of the matter asserted, Your Honor.

THE COURT: I disagree, Counsel. I think it would be hearsay, and I'll sustain the objection.

Q. Okay.

Did Mr. Parrish provide you any information about anything Alexis had said?

A. Yes.

Q. What did he tell you?

MS. WILLIAMS: I would object to what he said, but not to the defendant's responses, however.

THE COURT: I'm going to direct the witness not to repeat a direct conversation with Mr. Parrish --

MR. GIRARD: Your Honor --

THE COURT: -- but he can respond as to what he did based on the information that was given to him.

MR. GIRARD: I don't think him being -- Mr. Parrish would say something that I would be offering for the truth of the matter asserted in this situation because I don't think it's hearsay.

THE COURT: Would you excuse us for a moment, ladies and gentlemen? If you would put down your note pads.

(Jury excused.)

THE COURT: Counsel, I think we should -- I

want you to be able to make your argument outside the presence of the other jurors.

MR. GIRARD: I appreciate that. I anticipate what he'll say was Mr. Parrish accused him of trying to pull down his daughter's pants. We certainly aren't introducing that as to try to prove that, in fact, that happened. So I don't think it is offered for the truth of the matter asserted. It's only to -- to state what my client was going through and what was in his mind.

MS. WILLIAMS: Your Honor, I don't have any objection to if he wants to reference it as to Alexis' allegations. That enables him to answer the question and put it into context for the jury. But the specifics of what Mr. Parrish said are hearsay, so to the extent that he's already said it was about Alexis' allegations, he's able to provide his response to that, especially given that his response is going to be "I don't remember."

THE COURT: I think if you want to term it in terms of did he -- well, let's see. If you want to ask him the question did he advise you of the allegation made by Alexis, I think we can serve the same purpose. I understand what you're arguing, Counsel, but we've already impeached the consistency

of what Mr. Parrish has already said and --

MR. GIRARD: I wasn't trying to -- I frankly wasn't trying to impeach him. I was just wondering --

THE COURT: No, no, no. But, I mean, his -- Mr. Parrish's statements have been -- well, they have been impeached in terms of what he said here on the stand versus what he told the officers. So the jury could interpret it as another version of what Mr. Parrish was trying to -- of the events he was relating.

But I know exactly what you're arguing, and that it's more to his state of mind or how he reacted to those things. But I'll give you some leeway on it, but I think this is one of those things where you're both right. I think you can phrase in a manner in which we don't have to directly quote him.

MR. GIRARD: That's fine.

THE COURT: Okay. Let's go ahead and bring the jury out. This is one of those situations where we'll take a few more minutes of testimony and then if you have -- because you probably, what, have another hour or so or half hour?

MR. GIRARD: No. I have ten minutes maybe.

THE COURT: Okay. What I would like to do

then to accommodate you is to finish the direct this afternoon, and then we will -- I'm not going to have her ask three questions and then recess for the day. We'll do cross-exam tomorrow morning because I assume you've got more than ten minutes?

MS. WILLIAMS: I do, Your Honor.

THE COURT: Okay.

(Jury enters.)

THE COURT: Thank you, Ms. Mangus.

Ladies and gentlemen, please be seated. You can resume taking notes if you so desire.

Counsel, you can ask your next question.

Q. Did Mr. Parrish, during that phone conversation, discuss the allegations the Alexis had made?

A. Yes.

Q. What was your response?

A. Shock pretty much. I had no memory of it, so I just pretty much went numb at that point.

Q. And did you say anything else to Mr. Parrish?

A. I don't remember the exact conversation. It was pretty short. It was probably less than a two- or three-minute conversation. I was -- we were done and hung up before I hit the gate at Ft. Lewis.

Q. Is having sexual contact with an eight-year-old something you'd be interested in doing?

A. No, not at all.

Q. Do you have any memory of having any contact with Alexis after she went to bed that night?

A. No.

MR. GIRARD: That's all I have, Your Honor.

THE COURT: Okay. Rather than start cross-exam by the State, I'm going to go ahead and recess for the day, and we'll start cross-examination tomorrow morning.

There are a couple of conflicts within my courtroom, so don't be here any earlier than 10:00 tomorrow morning. So our start time will be 10:00. Thank you for your patience today. We'll see you tomorrow morning at 10:00.

Again, please don't discuss this case amongst yourselves or allow it to be discussed in your presence, and don't attempt to find out any additional information except for evidence that is presented here in this courtroom. And I know you're following those rules, but it doesn't hurt to remind you. And we'll see you back in the jury room at 10:00 tomorrow morning.

(Jury excused.)

THE COURT: Sir, you may step down.

(Witness excused.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. KENNETH A. PEEBLES, JR., Defendant.	Superior Court No. 13-1-03732-9 Court of Appeals No. 47392-5-II

VERBATIM TRANSCRIPT OF PROCEEDINGS
VOLUME VI

July 17, 2014
Pierce County Courthouse
Tacoma, Washington
Before the Honorable JOHN R. HICKMAN

remind you you're still under oath from yesterday.

THE WITNESS: Yes, sir.

THE COURT: Mr. Girard, you completed direct; is that correct?

MR. GIRARD: I have, Your Honor. Thank you.

THE COURT: Counsel, your witness for cross-exam.

MS. WILLIAMS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. WILLIAMS:

Q. So your name is Kenneth Peebles, Jr.?

A. Yes, ma'am.

Q. You've never been married to Alexis Parrish?

A. No.

Q. Never been in a state-registered domestic partnership with Alexis Parrish?

A. No, ma'am.

Q. You're more than 36 months older than Alexis Parrish?

A. Yes.

Q. University Place is in the state of Washington?

A. Yes.

Q. Now, based on your testimony from yesterday, it sounds like there's about a 10- to 12-hour gap where

you just don't remember anything; is that correct?
A. That's about right, ma'am.
Q. So you can't tell this jury that you didn't do this?
A. I can't.
Q. Jeremy Parrish, you've known him for over 20 years?
A. Correct.
Q. You refer to him as Jer?
A. Yeah.
Q. He's your best friend?
A. Yes, ma'am.
Q. Yesterday you described your relationship after meeting as being inseparable?
A. Yes.
Q. And later on as being friends forever?
A. Yes.
Q. You've bought a house together?
A. Correct.
Q. You've lived together, even when you haven't been in that house?
A. Correct.
Q. Your families have lived together?
A. Yes.
Q. You even still -- well, at the time of this incident, you used his address as a permanent address?

A. Yeah. I guess so, ma'am.
Q. When you came back to the state, he offered you a place to live before you were able to buy your own place?
A. Yes.
Q. You know Angie Bio?
A. I do.
Q. You knew her as Mr. Parrish's wife?
A. Correct.
Q. And while they were married, you and Ms. Bio had no issues?
A. No.
Q. You got along?
A. Uh-huh.
Q. I'm sorry. You're going to say --
A. Yes.
Q. -- say "yes" or "no."
A. Yes. Sorry.
Q. Ms. Bio got along with your wife while you were still married?
A. Mostly.
Q. Mostly, okay. But mostly they got along?
A. Yes.
Q. And after their divorce, safe to say, you've had no contact with Ms. Bio?

A. I think one or two conversations, but, no, no real contact.
Q. Because Mr. Parrish was the one who you were primarily friends with, right?
A. Yes.
Q. You've known Alexis for most of her life?
A. I would say since she was four or five, somewhere.
Q. Four or five, okay. Certainly there was a period of time you weren't living in the state, but as you testified to yesterday, you would come back frequently to visit even when you were out of state, right?
A. About twice a year on average.
Q. You would always see Jerry when you came back if he was in the continent?
A. Correct.
Q. You got to know Alexis?
A. Yes.
Q. Alexis is a sweet little girl?
A. Very.
Q. Intelligent little girl?
A. Very.
Q. She called you Uncle Ken?
A. She did.
Q. She really loved you?

A. Yes, ma'am.
Q. You guys had a great relationship?
A. I think so.
Q. Prior to this particular incident, you didn't have any issues with Alexis, right?
A. No.
Q. And she didn't have any issues with you, right?
A. Not that I'm aware of.
Q. In general, she's a pretty affectionate kid?
A. Yes.
Q. So turning to July 16, 2013, that was the day this all began, correct?
A. Yes.
Q. Now, you were working that day?
A. I did.
Q. Were you supposed to work the next day?
A. Yes.
Q. What time were you supposed to start working the next day?
A. PT formation is at 6:30. I usually have to be on Ft. Lewis by a little before 6:00 just because of the traffic and everything.
Q. Which is why you set your alarm for 5:00?
A. Correct.
Q. Now, PT formations last an hour and a half, correct?

A. The -- yes.
Q. And then after that?
A. We get an hour and a half from 8:00 to 9:30 for personal hygiene, breakfast, that stuff. And then we get back to doing whatever we're doing that day.
Q. Do you remember what day of the week July 16th was?
A. I believe it was a Tuesday.
Q. Tuesday, okay. So a regular workweek for you?
A. Yes.
Q. Now, you said you got off of work around 4:00; is that correct?
A. I think so.
Q. So it takes you how long to get from work to Mr. Parrish's house?
A. No more than 15 minutes.
Q. So you got there about 4:30?
A. Right. Yes, ma'am.
Q. Nice summer day?
A. Uh-huh.
Q. I'm sorry. You're going to have to say "yes" or "no."
A. I believe it was.
Q. So just Mr. Parrish invited you over. You were going to pick up your mail?
A. Correct.

Q. Then was there the plan to have a barbecue or just to cook steaks made before or after you got there?
A. I think it was after I got there. I hadn't planned on staying any longer than to pick up my mail. He said he was going to cook a steak, and he makes the best steaks on the planet so I really couldn't say no.
Q. Nothing out of the ordinary, right?
A. No.
Q. You weren't celebrating anything?
A. No.
Q. There wasn't any sort of party?
A. No.
Q. It was just the roommates and you grilling some steaks and drinking some beer?
A. That was the plan.
Q. When you got there, Mr. Parrish was there?
A. Yes.
Q. Megan was there?
A. I believe so.
Q. Ty was there?
A. I don't know if he was there right when I got there, but he was there later.
Q. Are you sure he was there when --
A. No, I'm not. I mean, I'm sure he was there that

night, but ...

Q. Can't remember if he was there when you got there?

A. Correct.

Q. Tough to remember things about a year ago, right?

A. Yes, ma'am.

Q. Alexis was there?

A. Yes.

Q. You remember what Alexis was wearing?

A. No, I don't.

Q. Do you remember what Megan was wearing?

A. No.

Q. Do you remember what Mr. Parrish was wearing?

A. No.

Q. You were in your uniform when you arrived?

A. Correct.

Q. Mr. Parrish lent you some clothes; is that correct?

A. Just a pair of shorts. I wore my brown T-shirt that I had under my uniform on.

Q. What color were the shorts?

A. Dark blue. It was actually a pair of swim trunks.

Q. Now, did he let you change into those clothes right when you got there or did that occur later?

A. I'm not sure exactly. It's probably within a hour or so of getting there. It was after I started drinking.

Q. So when you got there at 4:30, your testimony yesterday was you don't remember anything after eating steaks; is that correct?
A. Correct.
Q. About what time did you eat the steaks?
A. I don't know.
Q. But you remember all the time that happened before you ate the steaks, right?
A. I don't know -- well, I don't know how long it was between 4:30 and the steaks were cooked. I had one or two beers -- well, probably two, but I wasn't keeping track of time. I couldn't tell you what time we ate dinner.
Q. This beer, you specifically remember -- and I wrote this down yesterday -- that it was brewed to be as high alcohol content as possible?
A. Yes.
Q. You have a very clear memory of that particular fact?
A. We brewed several batches together. It was probably, total, the fifth or sixth patch that we had done together.
Q. My question was, though, that you have a very clear memory of that particular fact?
A. Yes, ma'am.

Q. Now, how does Jerry store it?
A. It was stored in small five-gallon kegs, the five-gallon bags, and they were stored in the refrigerator in the garage.
Q. Mr. Parrish described using pilsner glasses to consume that.

Was that what was going on?

A. Yes, ma'am.
Q. So in order to refill your glass, would you have to go down to the garage?
A. Yes.
Q. And who was refilling your glass for the time that you can remember?
A. I remember refilling it once.
Q. So you get there, and you said yesterday you started drinking right away, right?
A. Yes, ma'am.
Q. Any particular reason?
A. Well, he had two batches of beer. The one he had just finished that I went downstairs for was supposed to be ready that day. It was a lighter beer summer type thing, a Corona with Blue Moon. I actually poured the wrong beer. I wanted to try the new one, but that's really the reason I started drinking. I wanted to try the new beer.

Q. So did you just pound that first beer?
A. Pretty much, yes, ma'am.
Q. How quickly did you drink it?
A. I don't know. Less than -- within a half hour, I would guess.
Q. This was in just a regular pilsner glass?
A. Yeah. They're large glasses. I mean, they're about this tall. He keeps about ten of them or so in his freezer.
Q. So after you pounded that first glass of beer -- which was the beer that was brewed to be as high alcohol content as possible; is that correct?
A. Yes, ma'am.
Q. The second beer, you walk down to the garage, you fill your glass. You have a memory of that, correct?
A. Yes.
Q. Which beer?
A. It was the same beer.
Q. Even though you wanted to try the lighter beer?
A. Yeah. But I really liked the high-alcohol content beer.
Q. So you just wanted to drink that high-alcohol content beer?
A. It tastes good.

Q. Okay. That is the last beer that you remember drinking?
A. Yes, ma'am.
Q. How quickly did you drink that one?
A. I don't know.
Q. You don't know?
A. Between the first beer and whenever we had dinner. I had it -- I had it with the steak.
Q. With the steaks. So the first beer you had was before the steak?
A. Yes, ma'am.
Q. And where were you eating?
A. I believe in the kitchen. It would have -- I don't know if it was the kitchen or the dining room table that was in the kitchen.
Q. The first beer you had was before the steak, and the second beer you had was with the steak?
A. Yes, ma'am.
Q. Any drinks prior to coming over that day?
A. No.
Q. Now, Alexis, what was she doing?
A. Playing, watching TV. I don't remember specifically.
Q. You ever been drunk around Alexis before?
A. Yes.

Q. Was that a frequent occurrence?
A. I don't know if it's -- I don't know what you'd consider frequent. It's been a handful of times I suppose.
Q. When you get drunk, do you tend to slur your speech?
A. When I get -- when I get drunk enough.
Q. Stumble?
A. Not very often.
Q. Not very often. You've got pretty good balance?
A. Yes, ma'am.
Q. Would that be from the jujitsu?
A. I've been doing sports in one form or another pretty much my whole life.
Q. Okay. Now in terms of alcohol, you know, it does affect memory; that's correct?
A. Yes, ma'am.
Q. It affects physiology?
A. Yes, ma'am.
Q. It lowers inhibitions?
A. I suppose, ma'am.
Q. You've heard of things like drunk dialing, right?
A. Yes, ma'am.
Q. Where you get drunk and you maybe call an ex and you say something stupid?
A. Yes, ma'am.

Q. And you probably wouldn't have done it if you'd been sober, right?
A. Correct.
Q. Now, what is the very last memory that you have? Please tell this jury what it is.
A. Eating steak.
Q. At the kitchen table?
A. I believe it was the dining room or the kitchen counter.
Q. But you --
A. I was standing, not actually at the table.
Q. Okay, gotcha. But you're not 100 percent certain?
A. No, I'm not.
Q. How much of the beer was in the glass in this very last memory that you can remember?
A. I couldn't tell you, ma'am. It wasn't full.
Q. Wasn't full. Half full?
A. It's as good a guess as any, ma'am.
Q. I don't want you to guess, so if you really don't remember, that's --
A. I don't remember.
Q. So after approximately two, maybe a little less than two beers, you black out?
A. Yes, ma'am.
Q. Now, the next morning, you knew that you had to be

up at 5:00 a.m.?
A. Yes, ma'am.
Q. You knew that you had to do an hour and a half of PT beginning at 6:30?
A. Yes.
Q. And you knew that you had to go through your entire workday?
A. Yes, ma'am.
Q. As you've already said, this barbecue with friends wasn't of any particular significance or a special occasion?
A. Correct.
Q. So the next thing you remember is the next morning waking up and your phone's plugged in?
A. Yes.
Q. Somebody plugged in your phone?
A. Yes.
Q. You don't live with anybody?
A. No.
Q. So you would have plugged in your phone?
A. Probably.
Q. But as you've claimed, you have no memory of that?
A. Correct.
Q. And that Mr. Parrish calls you after you get back from PT?

A. I sent him a text on my way home after PT, probably around 9:00, and then he called me in response to that text.
Q. During PT you're actually able to get through the entire eight-mile run?
A. Pretty easily. I was running a lot, and truthfully it was pretty far from the first time that I'd run six, seven, eight, ten miles hung over.
Q. Well, you have a 12-hour blackout, but you're able to run eight miles and -- even though you were still drunk, according to your testimony, from yesterday?
A. Yes. It's definitely not the first time I've done that.
Q. And you can't actually tell this jury that you didn't come in Alexis' room?
A. I can't.
Q. You can't tell this jury that you didn't crawl into bed with Alexis?
A. No, ma'am.
Q. You can't tell this jury that you didn't stick your hand down her pants and fondle her butt or vagina?
A. I didn't do that.
Q. You can't tell this jury that you didn't do it?
A. I can't.
Q. Because you have no idea, according to your

testimony?

A. Correct.

MS. WILLIAMS: I have nothing further, Your Honor.

THE COURT: Thank you, Counsel.

Mr. Girard, any redirect?

MR. GIRARD: No, Your Honor. Thank you.

THE COURT: Thank you, sir.

Mr. Peebles, you may step down.

(Witness excused.)

THE COURT: Any further witnesses?

MR. GIRARD: We rest, Your Honor.

THE COURT: Thank you, sir.

Any rebuttal witnesses?

MS. WILLIAMS: The State does not have any rebuttal, Your Honor.

THE COURT: We'll do a brief check outside the presence of the jury in terms of making sure that all exhibits that have been admitted are available, but we can do that outside the presence of the jury.

Ladies and gentlemen, that concludes the evidentiary portion of this case. You can put down your notebooks. We're going to prepare -- the Court's going to prepare jury instructions, and those will be read to you, and then you'll go back to start your

EXHIBIT "B"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. KENNETH A. PEEBLES, JR., Defendant.	Superior Court No. 13-1-03732-9 Court of Appeals No. 47392-5-II

VERBATIM TRANSCRIPT OF PROCEEDINGS
VOLUME VI

July 17, 2014
Pierce County Courthouse
Tacoma, Washington
Before the Honorable JOHN R. HICKMAN

defendant guilty as charged of child molestation in the first degree.

Thank you.

THE COURT: Thank you, Counsel.

Ladies and gentlemen at this time, I would ask you to give your full attention to Mr. Girard on behalf of his client, Mr. Peebles.

MR. GIRARD: Thank you, Your Honor.

Good afternoon. The State has not proven this case. The initial statement made by Alexis to her dad that he -- is just as consistent with another scenario, that Mr. Peebles goes to his bedroom, which he's slept in many times forgetting that Alexis was there, climbs into bed, stretches out, accidentally puts his hand on Alexis' bottom, wakes her up. Being made aware of what to do in that situation, she perceives it as a sexual contact, goes down and tells her dad what happened.

The evidence in her first statement to her dad is consistent with that as easily as what the State is arguing. In addition, the most credible statement she made was her first, and what she said afterwards was different. And the State wants you to ignore that and justify it, but that can't be done. The distinctions are too significant, and I'm certainly not suggesting

that Alexis is lying, but what she remembers, waking up in a very short period of time and going down and telling her dad what happened, and what she remembers is foggy to her. And she was -- and further evidence that she misperceived what was going on.

It's unfortunate Mr. Peebles cannot tell you what happened because of what he drank. It's something he shouldn't have done. It's something he's done before, without these ramifications obviously. I'm sure he would rather be able to have a memory and tell you he didn't do it, which is what we would have done, I'm certain, if he had that memory. Why he would choose to make a decision the next morning and claim he didn't remember anything wondering why he got home in some scheme to try to hide his guilt, rather than affirmatively say that didn't happen, is farfetched. That he would have the foresight to know that there might be a defense of intoxication and then set up this scheme of texting Mr. Parrish and saying how did I get home and explaining and he didn't understand how he got home.

When you consider all the evidence that's presented and the jury's instruction that Judge Hickman provided to you, the only result in this case can be that of not guilty.

When you deliberate in this case, you are judging the State's case more than you're judging Mr. Peebles. You're judging whether or not they have proven their case beyond a reasonable doubt. In doing that, you're basically the judges of the facts of the case. Judge Hickman has been ruling on the law. You are the judges as a collective group of the facts. It's important you consider those facts in light of the law and render your decision.

Jury Instruction No. 3 provides you a framework of analysis for those deliberations. They talk about the important constitutional principles of proof beyond a reasonable doubt, presumption of innocence and the burden of proof being on the government. Excuse me, Jury Instruction No. 2.

Every issue in the case is put into dispute when Mr. Peebles pled not guilty. The State has the burden of proving each element of the crime beyond a reasonable doubt. Mr. Peebles has no burden to prove anything, including trying to prove lack of reasonable doubt or reasonable doubt. He's presumed innocent. Kind of ironic.

We spent several days trying to pick a jury that could be unbiased in this case, and one of the first things you hear as jurors you need to be

completely biased. You have to be completely biased in favor of Mr. Peebles, and that is where you begin your deliberations. You presume he is innocent. That only changes if the government has overcome their burden beyond a reasonable doubt.

And, yes, I know at least one of you has been on both of these types of juries. There's a big difference between standard of proof in a criminal case, which is beyond a reasonable doubt, and that in a civil case over money, where it's more probable than not. For example, you could decide that Mr. Peebles is probably guilty, and what would your verdict be? It would be not guilty. That doesn't prove the case beyond a reasonable doubt. It's a much higher level of proof. And if you're a reasonable person, you have some doubt, that's proof beyond a reasonable doubt, and the verdict is not guilty.

What needs to be proven -- and the essence of this case -- is whether there was sexual contact. There has to be a touching of a sexual or other intimate part of the body, and it has to be done for the purpose of sexual gratification. Those are two parts of sexual contact. Both of those need to exist for a verdict to be rendered of guilty.

The first statement made by Alexis, think

about the situation that she was in. She was asleep. She wakes up. Within five minutes, she's down in her dad's room. She says Uncle Ken tried to pull my pants down, and so I knocked his hand away and came down and talked to you. That's basically what she says. She said that she recognized him because she felt his head and he had no hair, so she realized it was him. There's no mention of seeing him. Describes him by his lack of hair.

Next morning, Mr. Parrish stays home, talks to her again. She gives the same report except she adds one additional detail and that is, did not touch my privates. And as Alexis testified, her privates are her bottom, her front and her chest. She made it clear to him that she did not get touched on any of those places. The State wants you not to believe that, that that report is incomplete and that she completed it later on.

Think about the circumstances where you wake up, you go down, you report it right away to your dad, someone you trust, someone you love, without time to contemplate what you're going to say. You just go down and tell him that's what happened. That's the most credible of the versions she gave because it was spontaneous and it was done immediately after the incident.

Again, in order to say something other than the full truth, she would have had to say, well, this is my dad's best friend. I better not say everything so I'm just going to say a little bit. Does that make sense that she would in the time waking up from a sleep, going downstairs talking to her dad, then say, oh, I better change the story a little bit in order to walk this line between my Uncle Ken's friendship with my dad and my desire to report this and get help from my dad. Makes no sense. What she would have done is said what happened then and there, and that's exactly what happened from her point of view.

Next morning she adds additional information that wasn't discussed the previous night, that she hadn't been touched on her private parts.

And Ms. Williams indicated, I misspoke about being touched on the hip. What I actually said was she demonstrates how she was touched in that video, and she puts her hand here. She also said he left it there like he wanted me to push it away, was waiting for me to push it away, which would be consistent with Mr. Peebles drunk and going to bed and had his hand lying on her hip, she waking up, seeing this, perceiving it as a threatening situation in which she is being victimized and going down and telling her dad.

The importance of the differences in which she says next time she talks, next time she talks after that, are that if she was truly clear and had a memory of this incident, she would remember the same thing each time and not different things in various times as far as, as I said, how she identified him. First she said it was by feel. Then in the forensic interview, she said it was still light out at 11:30 or 11:00, and she saw Uncle Ken next to her. In testimony she said the shades were open, it was a full moon, and she saw him.

Again, differences.

Then there's the timing. In my interview with her, she indicated that someone came to bed with her. She thought it was her dad. She went back to sleep and then later on was woken up with Uncle Ken next to her with his hands on her. It's very clear this was a very short window of opportunity that couldn't have happened, that someone came into bed, she fell asleep, woke up again later on.

She said a similar thing to you on the witness stand, that someone came in. It was Uncle Ken. She recognized him as Uncle Ken. He laid down next to her, was in a similar position to her laying next to her. She went to sleep. She says she was touched once the first time. She said it was when she -- she didn't

remember that one because she was asleep at the time. And then she said I woke up a second time, and he touched me again. Again, that's not possible in the time frame that she -- that this occurred in.

Now, is that because she's lying? I don't think so. Because she didn't have a perception of what really happened at the time and is filling in, for some reason, different facts. And who knows what the reasons are, but they are definitely, first of all, different and, second of all, inconsistent with what the known evidence is of the time frame.

Ms. Williams wants you to discount the testimony of her dad, that for some reason, he would lie to protect Mr. Peebles at the expense of his daughter. That's not true. That doesn't make sense. He did act in an appropriate way. He immediately got Mr. Peebles out of the house, got him out of the way, got him gone so his daughter would be protected in that way. He went home, had her stay in the bedroom with him.

Next day he chooses to stay home from work, see how she's doing. He obviously didn't have a good relationship with his ex-wife. The thought of going to his house was a horror to her. You can understand how he wouldn't have to communicate this to her. He knew he had to he put it off, perhaps to gather more information

from Alexis, consider what the options are.

He suggested not calling the police. Why? Because he thought having to go through all this might be a worse harm than the initial -- the noncontact that she reported. That going through interview after interview after interview, testifying in front of a bunch of people might be a bigger harm than being touched on the hip. He discussed it with her. And certainly he was a friend, and that was a factor too given the minimal contact, perhaps that he might have had some concerns that would certainly affect Mr. Peebles' career, and that might have been a factor too. But as he said, the primary purpose, the primary reason he discussed whether or not he should report it to his wife was because of the concern he had for his daughter and the process that it involved.

And who do you think she'd be more willing to talk to about embarrassing things than her dad and me, who represents Mr. Peebles and has never met her before and is in some room upstairs interviewing her. This is one of the first times she ever said to anybody that she was touched in her front and on her chest.

Would it be her dad she would say that to? Would it be her mother she was more likely to say that to? Would it be the forensic interviewer who was

trained to have that information? Would it be the nurse who is trained again or would it be some stranger who represents the person who allegedly did it? Again, the most credible version of events is the one that she gave first to her dad immediately after this happened.

The fact that the story evolved can't be dismissed by the forensic interviewer's statement that this happens sometimes. Under these facts it doesn't make sense that would happen given the spontaneity. It's not like there was a delayed reporting or anything like that. There was some resistance to talking about it by Alexis. She said it right away and she told them what happened without hesitation. She said it on the stand, I told them everything said it a couple times. She said it when the prosecutor asked her questions. She said it when I asked her questions. I told them everything.

At one point she said -- in Ms. Williams' statements, did you think you -- why did you think you were in trouble? She said, well, I might not have told them everything. And she said what did you not tell them? She said I don't remember. Then I asked later on, did you forget anything when you talked to your dad? She said no, she didn't.

Again, what's consistent with that is just

what I said. Ken goes upstairs. He slept in that bed numerous times, climbs into bed. His hand touches Alexis' butt. She wakes up from a sound sleep, sees that, perceives it as being a sexual act and reports it to her dad when it was no more than a touching done in a mere happenstance. It just happened -- the hand happened to be there without any sexual intent at all.

As she demonstrated in the video that where she indicates she was touched here, clearly that's not a sexual part of the body and it's not a particularly intimate part of the body. Here she said it was over her clothes. I don't know if that was discussed with her dad. There was no indication that it was, but it's not an intimate part of the body, your hip.

As far as the intoxication goes, Mr. Parrish told Deputy Smith that prior to them going to bed, that Ken was noticeably intoxicated, which means it was obvious he was intoxicated. He doesn't remember perhaps that, but he told Deputy Smith that the very next day. You heard Deputy Smith testify to that fact. And to suggest that Mr. Peebles wasn't and that he was making that up or maybe he was acting ahead of time because he knew he was going to do this act is not supported by the evidence.

He was passed out. He was incoherent. He

slept all the way back to Puyallup. He goes to bed somehow, plugs his phone in out of habit, wakes up the next morning and says how did I get here? Again, I'm sure he wishes he had a memory, but, unfortunately, he doesn't.

Reasonable doubt is doubts for which a reason exists. As I stated, a doubt exists because the evidence is -- most credible evidence of Alexis' disclosures is consistent with noncriminal conduct as it is with criminal conduct. There's no way to tell from that disclosure that there was sexual contact. No touching of private parts. One touching from a drunken person climbing into a bed that he'd slept in many times before. Perhaps when Alexis got up, he realized he's in the wrong bed, went to the other bedroom and crashed there on the air bed. It's a doubt for which a reason exists.

You have the testimony of Mr. Peebles. He would have no interest in having sexual contact with an 8-year-old or with Alexis. That's something he would not do. He was asked by the prosecutor this morning, did you touch her vagina, did you touch her bottom?

MS. WILLIAMS: Objection. Mischaracterization of what the State's questions were. I never asked him that.

THE COURT: Objection's noted for the record.

MR. GIRARD: He said I didn't do that. And she said, well, you have no memory of it, right? And he said yes, and she said you can't say that you didn't. Then he agreed with that, but he said no, I didn't because he doesn't believe he did it because he wouldn't do that. That's a doubt for which a reason exists.

The argument with Ms. Williams -- we talked about the brave Alexis and the difficulty she had to go through with this thing and how difficult it must have been. And I certainly wouldn't want my child to have to go through that. For you not to have sympathy for Alexis and having to go through this process is -- would be -- I mean, you wouldn't be human.

But as Judge Hickman said earlier, you have to leave those thoughts and those arguments at the courthouse steps. You don't bring that into the -- you don't bring that into the jury room, and I urge you to do that.

State's going to get up and argue again. They're going to discuss -- she's going to discuss why you shouldn't find doubt in this case. I don't have a chance to rebut that, so listen to her argument, consider what counter argues that. And since I don't

have the opportunity to do so, I trust you to do that.

After you listen and consider all the evidence, after you consider the law and what actually happened here, you'll find a doubt in this case that there was not sexual contact, that there wasn't a touching of an intimate part of the body. And if there was a touching, it wasn't for purposes of sexual gratification. That it was an accident that, in fact, happened. It was unfortunate that it happened, but it wasn't what Alexis perceived it to be.

For that reason, Mr. Ken Peebles is not guilty.

Thank you.

THE COURT: Go ahead.

Ladies and gentlemen, pursuant to our rules, the State has another opportunity to address the jury, so please give your attention back to Ms. Williams.

MS. WILLIAMS: Good afternoon again, ladies and gentlemen. The State gets the final opportunity to address you because it is our burden of proof to prove each and every element beyond a reasonable doubt. Defense counsel has used a lot of words: Misperceived, accident, unfortunate. None of those are accurate.

If this was just an misperception, if this was just an accident, then why does the defendant, after

PIERCE COUNTY PROSECUTING ATTORNEY

August 04, 2017 - 1:18 PM

Transmittal Information

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Superior Court Case Number:	13-1-03732-9

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